



No. 78-774

In the Supreme Court of the United States

OCTOBER TERM, 1978

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., PETITIONERS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JEROME M. FEIT,
ELLIOTT SCHULDER,

Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-139a) are not yet reported. The opinion of the district court (Pet. App. 1c-5c) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1b-2b) was entered on August 11, 1978. The petition for a writ of certiorari was filed on November 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTION PRESENTED

Whether the First Amendment entitles news media representatives and organizations to notice and a hearing before the telephone company may comply with a government subpoena seeking disclosure of journalists' toll-call records.

STATEMENT

Petitioners are two newspaper publishing corporations, twelve individual journalists, and a legal research and defense organization established to protect press interests. Petitioners filed this civil action against respondents American Telephone & Telegraph Company ("AT&T" or "the Bell System") and its operating subsidiary, Chesapeake and Potomac Telephone Company ("C&P"), in the United States District Court for the District of Columbia. Petitioners sought both declaratory and injunctive relief. They asserted that the First Amendment requires that journalists be given notice before their long distance telephone billing records are disclosed by the telephone company in response to a government subpoena (J.A. 7-15).¹ The United States intervened as a party defendant.

1. a. For billing purposes, telephone companies maintain records of long distance ("toll") calls. These business records, which are retained for six-month periods (J.A. 87-88), ordinarily include the number of the subscriber to be billed for the call, the number called, and the date, time, and duration of each call (*id.* at 70). Toll-call records do not reflect the con-

tents of any call. Except in the case of some collect, person-to-person, and third-number charge calls, toll-call records do not reveal the names of the parties to the calls (*id.* at 70-71). The telephone subscriber at each number called can be identified, however, from commercially available directories (*id.* at 202-203). Toll-call records are often valuable in criminal investigations because the information they provide helps law enforcement officers determine the scope of a criminal enterprise and the identities of the participants therein (Pet. App. 4a-7a & n.7).

Before March 1974, the Bell System had no uniform policy governing the release of company billing records to law enforcement officials (Pet. App. 8a). The operating telephone companies generally complied with a subpoena or "other lawful demand" for a subscriber's toll-call records (see 47 U.S.C. 605), without providing notice to the subscriber whose records were the subject of such a demand (J.A. 25, 61-62).

On March 1, 1974, the Bell System adopted a formal policy governing the release of toll billing records (J.A. 39-43, 57-61, 93-95).² Under this policy, release

² The decision to adopt the policy originated solely with AT&T (J.A. 16, 162). After the policy was formulated, but before it became effective, AT&T officials met with representatives of the Department of Justice to advise them of the new policy (*id.* at 106-116, 157-162). Department officials strongly opposed the policy, particularly the requirement of a subpoena (*id.* at 122-124, 161). In response to the Department's suggestions, AT&T made several modifications in the policy prior to its effective date (*id.* at 124, 160-161, 162), but the subpoena requirement was retained.

¹ "J.A." refers to the joint appendix in the court of appeals.

of such records is prohibited except in response to a facially valid subpoena or summons issued by a court, legislative body, or statutorily authorized government agency (*id.* at 40, 59, 94). In addition, the Bell System's policy requires that a subscriber whose toll-call records have been requested by subpoena or summons be notified by telephone the same day that process is received, and also by letter within 24 hours (*ibid.*). Both the oral and written notifications must identify the government agency, court, or legislative body requesting the records and include the approximate date on which the records will be furnished (*ibid.*). The required notice may be delayed only when records are subpoenaed in connection with a felony or legislative investigation and the subpoena is accompanied by a written certification stating that the investigation may be impeded by disclosure of the records request to the subscriber (*id.* at 40-42, 59-61, 94-95). Such a certification is effective for 90 days, subject to renewal for successive 90-day periods by additional written certifications.³

b. In December 1973 and January and March 1974, petitioners wrote AT&T demanding written assurances that they would receive advance notice before

³ In a memorandum dated February 20, 1974, to all United States Attorneys, the Assistant Attorney General for the Criminal Division of the Justice Department advised that certifications requesting nondisclosure should be made as a matter of course in all felony investigations involving a continuing offense or series of offenses. Certifications are not made in investigations of completed offenses unless there is some actual basis for belief that disclosure would impede the investigation or prosecution (J.A. 165).

their toll billing records—or the records of other subscribers containing a reference to petitioners' numbers—would be furnished to the government in response to a subpoena (J.A. 13, 20-21, 22, 23-24). Petitioners also demanded information concerning any past instances of government access to their toll billing records (*id.* at 12, 20, 22, 23-24). AT&T furnished the requested information concerning previous instances in which petitioners' toll billing records were produced in response to a grand jury subpoena or a summons from the Internal Revenue Service; the company refused to comply, however, with petitioners' demand that they receive assurances regarding advance notification of future government subpoenas (*id.* at 13, 25-33).

2. On December 27, 1974, petitioners commenced the present action. Contending that disclosure of their toll billing records to government investigative agencies "drastically curtails" their ability to gather and disseminate news (J.A. 11), petitioners sought a judicial declaration that the First, Fourth, Fifth, and Fourteenth Amendments entitle them to notice and an opportunity for a hearing before AT&T and C&P release their toll billing records in response to a government subpoena (*id.* at 14-15). The complaint also requested that AT&T and C&P be enjoined from releasing petitioners' records without such prior no-

tice (*id.* at 15).⁴ The United States intervened as a party defendant.

3. The record reveals that approximately 2,000 times each month AT&T and its operating companies produce toll-call records in response to subpoenas from federal, state, and local authorities (J.A. 227). Petitioners cite five instances in which the toll-call records of one or more petitioners (Anderson, Dudman, Polk, Rosenbaum, and Knight Newspapers) were furnished to government officials (Pet. App. 10a-13a & nn. 17, 18, 19). A total of five petitioners were involved in these instances, all of which occurred prior to March 1, 1974, when the current Bell System policy was adopted (*id.* at 10a). The remaining ten petitioners have neither alleged nor shown that their toll-call records have been sought by, or furnished to, any government body, either before or after the policy's effective date (*id.* at 69a).

4. On cross motions for summary judgment, the district court granted summary judgment for respondents (Pet. App. 1e-5c, 1d). The court concluded that petitioners' First Amendment claim is foreclosed by *Branzburg v. Hayes*, 408 U.S. 665

⁴ Petitioners asserted that the Bell System's March 1974 policy concerning disclosure of toll-call records is "defective" because it "leaves with non-judicial government officials the choice of whether notice of a subpoena should be given to reporters" and "provides no assurance," even where notice is given, "that reporters will have sufficient time before compliance with a subpoena to contest the validity of the government's demand for [petitioners'] records" (J.A. 13-14).

(1972). The court also ruled that, under *United States v. Miller*, 425 U.S. 435 (1976), the Fourth Amendment does not provide petitioners with any judicially cognizable interest in preventing disclosure of the telephone company's billing records.

The court of appeals affirmed the denial of petitioners' motion for summary judgment and the grant of summary judgment against the ten petitioners who did not allege that their toll billing records were ever subpoenaed by, or released to, any grand jury or government agency. The court held that the First Amendment does not require additional procedural protection in connection with subpoenas for toll-call records, except perhaps when an individual plaintiff can show "(1) that there is an *imminent threat* that the Government will subpoena his toll records in bad faith, (2) that such subpoena will cause him substantial and *irreparable harm*, and (3) that his remedy at law is *inadequate*" (Pet. App. 68a). The court concluded that no such showing could possibly be made by the ten petitioners who did not allege that their toll records had ever been subpoenaed (*id.* at 66a-69a). As to the remaining five petitioners, the court ruled that the evidence of previous government inspections of their toll-call records was "just enough" to withstand a motion for summary judgment. The court stated that "it is at least a possible inference that the Government acted in bad faith in issuing these past subpoenas," and that "it is [also] possible that, upon further proof, the circumstances of these

past inspections might indicate the imminence of further abuse" (*id.* at 69a). Accordingly, the court of appeals remanded the case to the district court for further proceedings to determine whether these five petitioners are entitled to the equitable relief they seek (*id.* at 66a-76a, 79a).

Chief Judge Wright dissented (Pet. App. 101a-139a). He concluded that, as professional journalists and publishers engaged in the process of gathering and distributing news, petitioners are entitled, under the First Amendment, to prior judicial scrutiny before telephone records of their contacts with news sources are released to the government.

ARGUMENT

Petitioners contend that the First Amendment entitles them to notice before the telephone company releases their toll billing records in response to a government subpoena.⁵ Relying on *Branzburg v. Hayes*, 408 U.S. 665 (1972), and *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), petitioners argue that at least some opportunity for prior judicial scrutiny must be provided before the government is permitted to examine reporters' toll billing records. This is so, petitioners assert, because the government may use such records to identify reporters' news sources. Petitioners warn that, in the absence of a procedure through which journalists can challenge government subpoenas

⁵ Petitioners' complaint also asserted claims under the Fourth, Fifth, and Fourteenth Amendments, but these have not been pursued in this Court.

for their toll records, or by which the government is required to obtain advance judicial approval for such subpoenas, the utility of the telephone as a means for acquiring information from confidential sources will be diminished, and reporters' newsgathering activities, activities protected by the First Amendment, will be seriously hampered. The court of appeals properly rejected this plea for special procedures in connection with subpoenas for journalists' toll records, and further review by this Court is not warranted.

This case does not involve a challenge to a particular subpoena or summons that has already been issued. Although the toll-call records of several petitioners have previously been released to the government, petitioners do not seek damages as a result of those incidents. Instead, petitioners ask that the courts fashion "extraordinary prospective relief by which they are to be protected from future subpoenas" (Pet. App. 66a). Petitioners do not allege that any of their toll-call records have been subpoenaed by any government agency since January 1974. Indeed, petitioners do not allege that *any* journalists' toll-call records have been subpoenaed during this period. Nevertheless, petitioners argue, the mere possibility of such a subpoena threatens their ability to gather news from confidential sources. Although the First Amendment injury asserted by petitioners is perhaps more immediate and direct than that alleged in *Laird v. Tatum*, 408 U.S. 1 (1972), and therefore is arguably sufficient to support a "case or controversy" within the meaning of Article III, the fact that no subpoenas have been

issued for any of petitioners' toll-call records in the last five years is surely relevant to the question of petitioners' entitlement to the equitable relief they seek. The court of appeals correctly concluded that, without a substantially more persuasive showing that petitioners are subject to an imminent threat of irreparable harm from government subpoenas, no relief is appropriate in this case.

Petitioners assert (Pet. 2, 11) that the question presented here was expressly left unresolved in *United States v. Miller*, 425 U.S. 435, 444 n.6 (1976). But the cited portion of the Court's opinion in *Miller* merely observes that respondent there did not contend that the grand jury subpoenas at issue infringed his First Amendment rights. See also *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976). The question presented in *Miller* was whether bank records obtained pursuant to an allegedly defective subpoena should be suppressed. This Court held that respondent had no protectable Fourth Amendment interest in the subpoenaed bank documents, even though those records reflected respondent's business dealings. Accordingly, the Court did not reach questions concerning the subpoenas' validity or the suitability of suppression as a remedy for defective subpoenas. *Miller* did not raise, and the Court there did not consider or reserve, any question involving the right of a third party to notice and a hearing before the addressee of a subpoena or summons complies with such a legal demand. Petitioners' characterization of the question they pre-

sent as one which this Court has recognized and explicitly left for another day is thus inaccurate.

Moreover, the recent decisions on which petitioners rely, *Branzburg v. Hayes, supra* and *Zurcher v. Stanford Daily, supra*, do not support their First Amendment arguments. Petitioners focus on the fact that, when a subpoena is served on a reporter, as in *Branzburg*, or a search warrant is issued for news media offices, as in *Zurcher*, there is an opportunity for judicial scrutiny before the government may enforce its demand for information from a member of the press. Stressing the availability of a motion to quash in the *Branzburg* context and the role of a neutral magistrate in issuing the warrant challenged in *Zurcher*, petitioners contend that the First Amendment precludes telephone company compliance with a government subpoena for reporters' toll-call records unless there has been prior judicial approval of the subpoena or the reporters have been given a chance to obtain judicial review of the subpoena's validity. Petitioners' argument wholly ignores the clear distinction between subpoenas directed at a third party such as the telephone company and subpoenas or searches directed at reporters themselves. Any person who is the subject of a subpoena may move to quash that subpoena. The availability of a motion to quash in *Branzburg* is attributable to this general rule, not to the fact that the subpoenas in the case were directed at reporters. Likewise, a neutral and detached magistrate must approve every search warrant, not just those authorizing searches of newspaper offices. Here,

by contrast, petitioners argue for the application of special procedural rules because of their asserted First Amendment interest in the telephone company's records of their toll calls.

Ordinarily, persons who are not the addressees of a subpoena may not challenge that subpoena's validity. Petitioners seek to create an exception to this rule on the basis of the asserted effect disclosure of the toll-call records will have on their newsgathering activities. *Branzburg* and *Zurcher* do not aid this effort.

In *Branzburg*, the Court held that a journalist subpoenaed to testify before a grand jury conducting a criminal investigation does not enjoy a testimonial privilege under the First Amendment to refuse to disclose the identity of a news source. The Court observed that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." 408 U.S. at 682. Finding insufficient evidence to support the claims of reporters that confidential sources would refuse to provide information if newsmen were compelled to testify before a grand jury (*id.* at 693-695), the Court refused to create a constitutional shield "to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public * * *" (*id.* at 697). *Branzburg* thus established that the First Amendment does not permit reporters to withhold information about

their news sources when such information is sought in the course of a legitimate criminal investigation. Petitioners' First Amendment claim here is, if anything, less compelling than that asserted in *Branzburg*. A government subpoena for the telephone company's records of a reporter's toll-calls does not require the reporter himself to identify his sources; indeed, such a subpoena may not result in the identification of any sources at all. The inescapable inference from *Branzburg* is that reporters cannot mount a meritorious First Amendment attack on good faith government subpoenas for such toll-call records, and therefore they are not constitutionally entitled to greater notice than they currently receive under the Bell System's policy.⁶

Zurcher reinforces this reading of *Branzburg*. In *Zurcher* the Court rejected the claim "that the press should be afforded opportunity to litigate the State's

⁶ Petitioners can draw no support from the admonition in *Branzburg* that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." 408 U.S. at 707-708; see also *id.* at 709-710 (Powell, J., concurring). Petitioners have presented no evidence that they have been or are in danger of being subjected to any such harassment. In fact, ten petitioners have not even alleged that records of their toll-calls have ever been subpoenaed. With respect to the five petitioners who have alleged previous instances of government access to records of their toll-calls, the court of appeals has reversed the grant of summary judgment for respondents and remanded the case to the district court so that evidence may be heard on the likelihood of bad faith harassment directed against petitioners' newsgathering activities. On remand, petitioners will have the opportunity to present whatever evidence may exist of the kind of harassment against which the Court warned in *Branzburg*.

entitlement to the material it seeks before it is turned over or seized" pursuant to a search warrant. 436 U.S. at 566. The Court noted that notice and opportunity for hearing were held to be required in other cases only where the seizures of printed materials imposed a prior restraint on free expression or entirely removed the materials from circulation. As the Court further observed, however, "[n]ot every * * * seizure, and not even most, will impose a prior restraint" (*id.* at 567). Even more than the search warrant in *Zurcher*, the execution of which might physically disrupt publication activities, a subpoena to obtain a journalist's toll-call records "carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the [journalist's articles] or on [his] communication of ideas" (*ibid.*).

Although petitioners do not pursue any Fourth Amendment claim in this Court, they do contend (Pet. 18–21) that government subpoenas of records of their toll-calls "involves the compelled disclosure of confidential relationships with news sources * * *." But a subpoena directed at the telephone company does not compel petitioners to disclose anything. The telephone company produces the records in response to the subpoena; the materials thus obtained are not confidential because petitioners do not have a legitimate expectation of privacy in the company's records,

kept for its own business purposes, of its transactions with them. *United States v. Miller*, *supra*, 425 U.S. at 440, 442–444.⁷

Petitioners' citation of *NAACP v. Alabama*, 357 U.S. 449 (1958), and other cases dealing with the freedom of association is unavailing. In *Branzburg* this Court rejected the contention that cases such as *NAACP v. Alabama* control the question whether reporters may be required, under subpoena, to disclose their sources in a grand jury investigation. 408 U.S. at 680–682, 708. There is no reason for a different result when the same information is sought indirectly, from a third party, rather than from the reporters themselves. Furthermore, this Court has stated that *NAACP v. Alabama* is "inapposite where, as here, any serious infringement on First Amendment rights brought about by the * * * disclosure of [news sources] is highly speculative." *Buckley v. Valeo*, 424 U.S. 1, 69–70 (1976).

In short, the notice procedures sought by petitioners are not constitutionally compelled. This Court has repeatedly indicated in a variety of recent cases that the First Amendment does not entitle newsmen to special treatment not accorded to other members of American society. See *Houchins v. KQED, Inc.*, No. 76–1310 (June 26, 1978) (plurality opinion), slip op. 8–10, 14; (Stewart, J., concurring), slip op. 1–3; (Stevens, J., dissenting), slip op. 7; *Zurcher v. Stanford Daily*, *supra*, 436 U.S. at 565; *Pell v. Procunier*,

⁷ Moreover, as the court of appeals observed (Pet. App. 5a), there are means readily available for reporters to insure that telephone contacts with sensitive sources will not be revealed.

417 U.S. 817, 833-834 (1974); *Saxbe v. Washington Post*, 417 U.S. 843, 849-850 (1974); *Branzburg v. Hayes, supra*, 408 U.S. at 684.

This is not to say, of course, that the political branches of government cannot or should not impose additional restrictions on subpoenas for journalists' toll records. Indeed, the Department of Justice is currently considering the possibility of amending its regulations to require the Attorney General's personal approval not only for subpoenas directed toward newsmen (see 28 C.F.R. 50.10) but also for subpoenas designed to obtain records of reporters' activities from third parties, such as the telephone company. Perhaps more important, as the private respondents have noted (Br. in Opp. 16-17 & nn. 20-22), Congress has recently enacted legislation regulating government access to customer records maintained by federally supervised financial institutions,⁹ and several legislators have introduced similar bills covering records in the possession of communications common carriers, including telephone toll-call records.¹⁰ These bills would apply to telephone customers generally and would confer no special protections on members of the organized press. If such protections are desirable as a policy matter, they should be adopted by the political branches, not imposed by the courts as a constitutional requirement. See *Houchins v. KQED*,

⁹ See Pub. L. No. 95-630, 92 Stat. 3641 (1978).

¹⁰ See H.R. 214, 215, 95th Cong., 1st Sess. (1977); S. 14, 95th Cong., 1st Sess. (1977).

Inc., supra (plurality opinion), slip op. 11-12: "We must not confuse what is 'good,' 'desirable' or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, Jr.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JEROME M. FEIT,
ELLIOTT SCHULDER,

Attorneys.

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